June 18, 1959. (App. C, *infra.*) The Court denied that "the fact that the proposed decision is adopted without modification demonstrate [sic] the absence of independent judgment," relied further on "the presumption that official duty has been performed," and referred to but did not discuss the issues raised as to the findings. *Id.* at 13a. The judgment of said Court was filed on August 19, 1959. (App. D, *infra.*)

An appeal to the Court below, the District Court of Appeal of the State of California, Second Appellate District, having been noticed and perfected, petitioner preserved these federal questions. Point IV of his Opening Brief, for example, was entitled, "That the Procedure Pursued Herein by the Respondent Did Not Afford the Appellant a Full Hearing or Due Process of Law." Point III of Respondent's Brief purported to respond to this due process contention. In its decision filed August 22, 1960, (App. E, *infra*), the Court below directly addressed itself to the issues relating to the first question presented above, *Id.* at 31a. and to the second question, *Id.* at 29a.

These issues were raised in the Petition for Hearing filed in the Supreme Court of the State of California. The order of that Court denying hearing is reprinted herein as Appendix F, *infra.*

REASONS FOR GRANTING THE WRIT

This case necessarily presents issues of great importance in the administrative law, particularly the requirements of procedural due process in State proceedings which result in depriving a licensee of his right to practice his livelihood and or profession. The judgment below violates two essentials of due process under the Federal Constitution which have been zeal-

ously safeguarded by this Court: that he who decides must hear; and that jurisdictional findings must be made, must be based on the record, and cannot be established by mere bureaucratic assertion. The decision below is thus in conflict with the decisions of this Court; and it is in conflict as well with the decisions of Courts of other States. This Court should not permit these fundamental principles of due process to be neglected or eroded in state administrative proceedings.

I

In this case, he who decided did not hear. The Real Estate Commissioner made the decision to revoke petitioner's license; indeed, he is the only official authorized by state law to take such action. See the provisions of the California Business and Professions Code, App. G, *infra*. But the Commissioner himself had nothing to do with the hearing in this matter.

A Hearing Officer—not the Commissioner—conducted the only administrative hearing which petitioner received. It was the Hearing Officer—not the Commissioner—who aurally heard the facts and arguments presented. It was the Hearing Officer—not the Commissioner—who gave whatever consideration was afforded to the legal contentions and briefs. It was the Hearing Officer—not the Commissioner—who set forth the administrative findings and conclusions of law which constitute the only substantive justification for the action taken by the Commissioner against petitioner.

On November 21, 1958, the Hearing Officer submitted his "Proposed Decision" to the Commissioner. (App. A, *infra*.) On the very same day, the Real Estate

Commissioner "adopted" that decision as his own. (App. B., *infra.*) Transparently, the Commissioner did not hear or consider—could not possibly have heard or considered—any of the questions of fact or issues of law presented by the parties and requisite to a responsible adjudication. The bedrock fact in this case is that the Commissioner decided, but did not hear.[3]

Thereby the respondent Commissioner contravened the cardinal requirement that "The one who decides must hear." *Morgan* v. *United States*, 298 U.S. 468, 481. While the Court may not have found it necessary in that case "to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing," it is clear that the Court had the constitutional requirements firmly in mind, for the opinion of Chief Justice Hughes rested ultimately on "fundamental procedural requirements", the "quality" of administrative hearings "resembling that of a judicial proceeding", and the "duty" of the administrative adjudicator "akin to that of a judge." (*Id.* at 477, 480, 481). Whatever doubt might be conjured in other contexts as to the constitutional standing of this requirement of the *Morgan* case, there is no question that the California Courts have so recognized it. *Hohreiter* v. *Garrison*, 81 Cal. App. 2d 384, 184 P. 2d 323, 333.

To satisfy this due process requirement, a hearing affecting the substantial rights of citizens must

> "afford the safeguard that the one who decides shall be bound in good conscience to consider the

[3] In view of these indisputable facts, the assertion of the court below that "there is no evidence before this Court to the effect that the commissioner 'rubber stamped' the hearing officer's proposed decision" is no more than *ipse dixit*.

> evidence, to be guided by that alone * * *. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-481.

When such a hearing has not been given, public authority has unconstitutionally invaded the rights of the individual. If what is decided need have no relationship to what is heard, there is no brake on the administrative machine; and we have, or have come far too close to having, a government of men and not of laws.

Here, it is manifest that respondent Commissioner unconscionably failed to consider the evidence and to be guided by that alone; he did not himself read, review, or reflect upon the record. He did not satisfy the Constitutional requirements before he revoked petitioner's license. He took his action, not on the basis of his own judgment of the record, but upon the evaluation of another, upon the judgment of another, and upon the hearing of another. The Commissioner was the one whose determination of the facts and the law was decisive; but the Commissioner did nothing more than "Adopt" someone else's report.

Such a procedure cannot be reconciled with the requirements for a fair hearing reflected in *Morgan*. "*Morgan* requires a personal rather than a purely institutional decision. * * *. The one who decides in form must be the one that decides in fact."[4] In this case, however, petitioner was clearly the object of an institutional decision. There was no genuine personal

[4] Schwartz, *An Introduction to American Administrative Law*, 143.

participation by the official who revoked petitioner's license. That official was the one who decided in form. But how can it be said that he decided in fact? The requirement "has to do with personal understanding of the evidence."[5] What is essential is an "independent appraisal" of the evidence by the adjudicator and an "independent conclusion."[6] To assert there was any personal understanding of the evidence or any independent appraisal or conclusion in this case is to defy reality.

The decision below not only contravenes *Morgan* but is in conflict with the decisions of many other States. The courts of Connecticut,[7] Colorado,[8] New Jersey,[9] New York,[10] Pennsylvania,[11] Tennessee,[12] and Utah,[13] for example, have held that an administrative decision must be vitiated when those who made the purported decision did not in fact attend the hearing, afford consideration to the evidence, or otherwise demonstrate compliance with the requirement that the one

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[5] 2 Davis, *Treatise on Administrative Law*, 45.

[6] *Kilgus* v. *Board of Estimate of City of New York*, 308 N.Y. 620, 127 N.E. 2d 705, 710.

[7] *Koslow* v. *Board of Zoning Appeals*, 19 Conn. Sup. 303, 112 A. 2d 513.

[8] *Colorado State Board of Nurse Examiners* v. *Hohn*, 129 Colo. 195, 268 P. 2d 401.

[9] *Redcay* v. *State Board of Education*, 128 N.J.L. 281, 25 A. 2d 632.

[10] *Kilgus* v. *Board of Estimate of City of New York*, *supra*, note 6; *Weekes* v. *O'Connell*, 304 N.Y. 259, 107 N.E. 2d 290.

[11] *In re Marshall*, 363 Pa. 226, 69 A. 2d 619.

[12] *Chanaberry* v. *Gordy*, 200 Tenn. 220, 292 S.W. 2d 18.

[13] *Crow* v. *Industrial Commission*, 104 Utah 333, 140 P. 2d 321.

who decides must hear; and these courts have relied ultimately upon the due process requirement of the Federal Constitution.

Anomalously, in California, this case does not represent the exception, but, rather, the general rule. It is the law in that State that the official charged with the responsibility of decision need not himself review the record in any way if he wishes to adopt the hearing officer's report. Should he decide to change that report, however, he is required to make his own findings and conclusions. See *Hohreiter* v. *Garrison*, *supra*, for an authoritative description and attempted defense of this state practice.

Whether such practice is consistent with the Federal Constitution has been recognized as "a very serious question". Gallagher, *Power of the Industrial Accident Commission*, 27 Calif. L. Rev. 241, 265. Certainly this questionable administrative practice merits review by this Court.

One may have some realistic hope of administrative justice when the official charged with decision is also charged with the legal responsibility of making that decision his own; but there is no such hope of justice when there is no such legal responsibility. The Constitution requires that there be no gap between the hearer and the decider; the California practice recognizes the gap, and instead of attempting to bridge or control it, institutionalizes and legalizes it. How such a practice can be reconciled with due process is difficult to understand.

The decision below attempts to justify it on the ground that the Superior Court, on judicial review, exercises "independent judgment". (App. E, p. 31a.

infra). But on judicial review of administrative action in California, "the trial court does not have the right to judge the intrinsic value of the evidence or to weigh it. The judgment of the court is confined to whether there was substantial evidence before the commission to suport its findings." *Damiani* v. *Albert*, 48 Cal. 2d 15, 17, 306 P. 2d 780, 781-782; *Aluisi* v. *County of Fresno*, 159 Cal. App. 2d 823, 324 P. 2d 920, 922.[14] Accordingly, the reliance placed upon the judicial review to take the infirmities out of the California administrative practice is misplaced.

Nor can California justify its practice on the basis of expediency or economy. After all, most state action is likely the resultant of real and pressing practical problems. But this certainly cannot mean that the state action "is insulated from federal judicial review * * * when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347; see *Shelton* v. *Tucker*, 364 U.S. 479; *Talley* v. *California*, 362 U.S. 60; *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684. Likewise, state officials typically defend against the charge of violation of an individual's constitutional rights by proclaiming the firm practical necessity for their type of official conduct if the State's interests are to be served realistically, but this defense has never been taken as an obstacle to invalidation of State action which transgresses the rights guaranteed by the Fourteenth Amendment. See,

[14] A study of all the administrative judicial review cases in California from 1946 to 1956 produced this conclusion: "in not a single case during that period was there anything even approaching an unlimited trial de novo given by the superior court." Netterville, *The "Independent Judgment" Anomaly*, 44 Calif. L. Rev. 262, 270.

e.g., *Blackburn* v. *Alabama*, 361 U.S. 199; *Spano* v. *New York*, 360 U.S. 315; *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Rochin* v. *California*, 342 U.S. 165.

The mere fact that the deprivation of Constitutional rights is of long standing, and even embedded in the most deeply felt and sensitively held local mores, cannot prevent the enforcement of a Constitutional right. See, e.g., *Cooper* v. *Aaron*, 358 U.S. 1; *Brown* v. *Board of Education*, 349 U.S. 294.

Disregarding constitutional standards over a period of time does not endow the state practice with a status of legitimacy. That California has indulged in this violation of due process regularly and routinely does not make it any the less a violation.

Nor can it be argued that, while the violation by the State is plain, the individual right involved is so insignificant that this Court should not give its attention thereto. It is well established that "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239; and cases there cited.

Whether petitioner has been excluded from his profession in a manner contravening the Due Process Clause is an issue of general importance warranting the consideration of this Court. The California administrative practice involved herein has not been passed upon by this Court. Its invalidity under the Fourteenth Amendment seems plain; at the very least, it poses very serious and substantial constitutional issues. The administrative process presented on this

record is in direct conflict with the standards enforced under the Federal Constitution by the Courts of other states; and with the decisions of this Court. We believe this case contains all the ingredients and is an appropriate vehicle for a clear determination by this Court of the issues involved.

II

There was no finding by either the Hearing Officer or the Superior Court that in the transactions upon which the proceeding was based, petitioner was acting "in the capacity of a real estate licensee" or as such "licensee." That such a finding is jurisdictional for any action by respondent Commissioner is evident on the face of the statute pursuant to which he purported to act. See App. G; *infra*. Further, the Court below patently, though tacitly, assumed that such finding was jurisdictional; and expressly recognized that no such finding had been made. Its holding on this point was that "The fact that certain action was taken or a recommendation made raises the presumption that the existence of the necessary facts have been ascertained and found." (App. E, p. 29a, *infra*).

The presumption cannot stand analysis. It is a *non sequitur* and begs the real question. It eliminates any possibility of meaningful judicial review.

The fact that certain action has been taken has no logical relationship to whether the necessary facts have been found in a particular case. At most the assumptions involved are statistical. They may be true for some or even most cases. But human beings, including state officials, are fallible, even when acting in complete good faith and in accordance with the most meticulous standards of procedural due process. They sometimes err; they sometimes leap to conclusions.

And they sometimes make findings without any evidence whatever to support them. *Cf. Thompson* v. *Louisville*, 362 U.S. 199.

The presumption of regularity is therefore at best a rebuttable presumption. It is surely rebutted on a record where a jurisdictional finding was indisputably not made. There is no logical basis for presuming that a finding which was not made in fact must have been made in theory.

A general presumption precluding any particular exceptions would be the epitome of unconstitutional action. *Cf., Smith* v. *California*, 361 U.S. 147; *Tot* v. *United States*, 319 U.S. 463. Especially is this so where the presumption is that a finding was made and the fact is to the contrary.

It is unavoidably clear that the presumption relied on by the Court below eliminates any possibility of meaningful judicial review. If it is to be presumed that what the administrator did must necessarily be right—indeed, that what he admittedly failed to do must necessarily pass judicial inspection—there is no comprehensible content to judicial review. On this presumption, judicial review is devoid of function. It can never decree any amendments or modifications of the administrative action.

The theorem of the Court below is not only indefensible in theory but directly in conflict with the decisions of this Court. For one example, we may turn again to *Morgan* v. *United States*, 298 U.S. 468. This Court there made short shrift of the contention that the administrative recitals were entitled to such respect or presumption as that engaged in by the court below. This Court held that "the recitals of his procedure cannot be regarded as conclusive. Other-

wise the statutory conditions could be set at naught by mere assertion." *Id.* at 477; see *Waite* v. *Macy*, 246 U.S. 606. This is unanswerable, and is contrary to the presumption necessary to the decision below.

This Court has had occasion to point to the necessity for an administrative agency to make the findings of fact upon which its very jurisdiction depends. *Connecticut L. & P. Co.* v. *Federal Power Commission*, 324 U.S. 515; *Yonkers* v. *United States*, 320 U.S. 685; *Mahler* v. *Eby*, 264 U.S. 32.[15] Such findings must be express and addressed to the words of the applicable statute. They may not be "left entirely to inference." *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454, 464.[16]

While the above cited cases arose in the context of a particular federal statute, the principles involved are inextricably identical to those limiting State action under the Due Process Clause of the Fourteenth Amendment. Federal agencies must be kept within their statute lest they deprive individuals subject to their orders of liberty and property without due process of law. State administrative action is no less subject to constitutional standards. It is a violation of due process of law for an individual to be deprived of rights by administrative action, state or federal, which can lawfully be taken only on the basis of certain findings of fact, when those findings have not been made in actuality.

This issue is of general importance, for it bears upon every state administrative proceeding. Due

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[15] See *Federal Trade Commission* v. *B. F. Goodrich Co.*, 100 U.S. App. D.C. 58, 242 F. 2d 31.

[16] See *N.L.R.B.* v. *Capital Transit Co.*, 95 U.S. App. D.C. 310, 221 F. 2d 864.

process enforcement cannot tolerate action against an individual based upon fact finding by presumption. This case strongly suggests that now is the appropriate time for this Court to speak out, lest the accumulating numbers and types of State administrative agencies and actions proliferate similar deprivations of private rights without adherence to the due process requirements of the Fourteenth Amendment. The questions clearly and cleanly presented on this record make the case an appropriate subject for review by this Court.

CONCLUSION

Petitioner in this case stands deprived of the right to practice his profession and earn his livelihood as he has earned it throughout his economic life. For such deprivation at the hands of the State, due process of law is essential; but the absolute requirements of due process of law were not here satisfied. The one who decided, the official who legally made the decision which deprived petitioner of his rights, never involved himself in any hearing. The jurisdictional finding that petitioner was acting as a licensee was simply not made, but presumed on the basis of an all-encompassing and arbitrary judicial approval of administrative action. The issues presented by such state action are of general importance in the living application and administration of the Fourteenth Amendment.

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN Y. COLE
1730 K. Street, N. W.,
Washington 6, D. C.
Attorney for Petitioner

March 17, 1961

APPENDIX

APPENDIX A

BEFORE THE REAL ESTATE COMMISSIONER
OF THE STATE OF CALIFORNIA

No. H-13507 LA

IN THE MATTER OF THE ACCUSATION OF

F. J. BUCKLEY, Dba: F. J. Buckley & Company, *Respondent*

Proposed Decision

This matter came on regularly for hearing before M. A. Keller, Hearing Officer, at 541 South Spring Street, 310 Spring Arcade Building, Los Angeles, on November 18 and 19, 1958, William Prather, Counsel, representing the Real Estate Commissioner; and the respondent being personally present and represented by J. Marion Wright, Esq., Attorney at Law. Evidence both oral and documentary having been introduced, the Hearing Officer finds as follows:

As to the First Cause of Accusation

I

That the complainant, Malcolm Wood, has been and now is a duly appointed and acting Deputy Real Estate Commissioner of the State of California, and made and filed the Accusation herein upon information and belief in his official capacity as such, and not otherwise.

II

That the respondent, F. J. BUCKLEY, doing business as F. J. Buckley & Company, has been and now is licensed by the Division of Real Estate as a real estate broker.

III

That on or about March 6, 1955, one Margaret F. Slusher was the owner of improved real property situated in the City of Los Angeles commonly known as 674 Crenshaw Boulevard.

IV

That on said date of March 6, 1955, said Slusher orally employed respondent as a real estate licensee for a period of 60 days, for the purpose of effecting a sale of the property hereinabove described; that the property was listed with respondent for the total purchase price of $35,000.00, with the provision that respondent would receive a commission in the amount of 5% on the sale price thereof.

V

That the oral agreement hereinabove referred to was confirmed by a communication from respondent to the aforesaid Slusher, which communication was dated on or about March 17, 1955.

VI

That the oral agreement hereinabove referred to was extended for an additional indefinite period by oral agreement by and between respondent and the aforesaid Slusher.

VII

That during the 60 day period hereinabove referred to and thereafter respondent attempted to negotiate a sale of the property.

VIII

That on or about August 9, 1955, respondent presented to the aforesaid Slusher a written offer executed by one G. S. Chambrau, the offer providing that the sum of $1,000.00 had been received from the said Chambrau as a deposit thereon, the total purchase price being in the sum of $33,000.00; that the offer was accepted, the acceptance providing for the total purchase price less the sum of $1,650.00.

IX

That thereafter, and on or about August 9, 1955, an escrow was opened at the Wilshire Escrow Company under

Escrow No. 26543; that said escrow was closed on or about September 1, 1955, a deed to the purported purchaser being recorded on or about August 31, 1955, in Book 48824, at page 53, Official Records of the County of Los Angeles.

X

That the G. S. Chambreau referred to hereinabove was and is one Germaine S. Chambreau, a widow; that she was not, in fact, a bona fide purchaser of the property, had no intention or desire to purchase the property, paid no money or consideration, or received any money or consideration for her participation in the transaction as a principal; that the said Chambreau acted for and on behalf of respondent so that he might procure the property himself; that documents were prepared from time to time, either by respondent or by the escrow clerk at respondent's direction, and were presented by respondent to the said Chambreau for signature; that she did not at any time have knowledge of the contents of any document signed, and signed merely at the request and direction of respondent.

XI

That prior to the submission of the written offer executed by Chambreau as hereinabove found, and on or about July 1, 1955, respondent had procured from the said Chambreau a document signed by her containing a statement that the said Chambreau had no present or future interest in the property hereinabove referred to but that she was acting for one E. Haiss.

XII

That the E. Haiss referred to in the preceding paragraph was and is the wife of respondent, "E. Haiss" being her maiden name.

XIII

That shortly after the opening of the escrow hereinabove referred to respondent procured from the said Chambreau

her signature to a grant deed conveying the property hereinabove referred to, to E. Haiss; that said deed was acknowledged by respondent on or about August 10, 1955; that this said deed was held by respondent until December 12, 1955; and then recorded by him in Book 49769, page 66, Official Records of Los Angeles County.

XIV

That respondent did not at any time throughout the transaction prior to the close of escrow reveal to the said Slusher:

(1) That Chambreau was not, in fact, a bona fide purchaser of the property;

(2) That respondent had not, in fact, received from Chambreau the sum of $1,000.00 as a deposit in connection with the purported purchase thereof;

(3) That Chambreau was being used as a nominee, or "dummy," by respondent for the purpose of acquiring the property for himself, or an interest therein;

(4) That title to the property was to be taken in the name of E. Haiss;

(5) That "E. Haiss" was and is the wife of respondent.

XV

That the failure to disclose as set forth in the preceding paragraph, and each of the failures to disclose as set forth therein, was and is an unlawful act, constituting misrepresentation, in law, thereby subjecting the real estate broker license of respondent to discipline under the provisions of Section 10176 (a) of the Business and Professions Code of the State of California.

XVI

That in acting for the purported purchaser, Chambreau, and the said Haiss, without the knowledge and consent of the aforesaid Slusher, as hereinabove found, respondent has acted for more than one party in a transaction without the knowledge and consent of all parties thereto, thereby subjecting his real estate broker license to discipline under the provisions of Section 10176 (d) of the Business and Professions Code of the State of California.

XVII

That the acts of respondent as hereinabove found constitute fraud or dishonest dealing, thereby subjecting the real estate broker license of respondent to discipline under the provisions of Section 10176(i) of the Business and Professions Code of the State of California.

XVIII

That by each of the acts constituting a cause for discipline respondent has acted or conducted himself in a manner which would have warranted the denial of the issuance of a real estate broker license, thereby subjecting the real estate broker license of respondent to discipline under the provisions of Section 10177(f) of the Business and Professions Code of the State of California.

XIX

That the acts of respondent establish that he is not truthful or honest, and that by such acts, without regard to whether or not he was acting as an agent in this transaction, he has acted or conducted himself in a manner which would have warranted the denial of the issuance of a real estate broker license, thereby subjecting his said license to discipline under the provisions of Section 10177(f) of the Business and Professions Code of the State of California.

XX

That excepting as herein found to be true, each other remaining allegation of the Accusation is not necessary to a determination of the issues therein, and each therefore is found to be not true.

As to the Second Ground of Accusation:

I

That this said entire Cause of Accusation is barred by the provisions of Section 10101 of the Business and Professions Code of the State of California.

Pursuant to the foregoing findings of fact the Hearing Officer makes the following determination of Issues:

As to the First Cause of Accusation:

That the acts of respondent were and are unlawful and cause for discipline under the provisions of Sections 10176(a), 10176(d), and 10177(f) of the Business and Professions Code of the State of California.

As to the Second Cause of Accusation:

That said Cause of Accusation is barred by the provisions of Section 10101 of the Business and Professions Code of the State of California

WHEREFORE, the following order is hereby made:

As to the First Cause of Accusation:

That for the violation of Section 10176(a), 10176(d), 10176(i) and 10177(f) of the Business and Professions Code of the State of California, and for each of said violations, jointly and severally, and for each act constituting a cause for discipline under any of said Sections, the real estate broker license of respondent, F. J. BUCKLEY, doing business as F. J. Buckley & Company, together with his right of renewal or reissuance of said license, shall be and the same is hereby revoked.

As to the Second Cause of Accusation:

That this said Cause of Accusation shall be and the same is hereby dismissed.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of the hearing had before me on November 18 and 19, 1958, at Los Angeles, California, and recommend its adoption as the decision of the Real Estate Commissioner.

DATED: November 21, 1958.

M. A. KELLER
Hearing Officer

APPENDIX B

BEFORE THE REAL ESTATE COMMISSIONER
OF THE
STATE OF CALIFORNIA

Decision

The attached Proposed Decision of the Hearing Officer is hereby adopted by the Real Estate Commissioner as his decision in the above-entitled matter.

This decision shall become effective on the 12th day of December, 1958.

IT IS SO ORDERED.

DATED: November 21st, 1958.

F. W. GRIESINGER,
Real Estate Commissioner

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 717,588

F. J. BUCKLEY, *Petitioner*

v.

F. W. GREISINGER, *Respondent*

Memorandum of Decision

There is no conflict of evidence herein as to the substantial features of petitioner's conduct which culminated in the revocation of his license as a real estate broker.

In March, 1955, he called upon Mrs. Margaret F. Slusher to obtain a listing to sell her property around a corner from petitioner's office. Extensive painting and renovating were being done. She orally agreed to pay him a commission of five per cent of the sale price. He sent her a lengthy letter on his business stationery under date of March 15, 1955, wherein he stated in part: "May I also thank you for letting me have the exclusive agency on your property at 674 South Crenshaw for $35,000 with $10,000, or more, down payment, and the balance, if any, payable 1% per month including interest at 6%, until paid . . . I am confident we will be successful in selling it for you. In order to obtain $35,000 including our commission, I have quoted it at $37,500 because frequently they offer less than the asking price. If, perchance, we received more than $35,000 you are assured our commission would be only 5% and you would receive the benefit of the excess, if any." (Exh. 4; trans. p. 67.)

Petitioner testified that he showed the premises to several prospective buyers and that Mrs. Slusher delivered a key to him. Mrs. Slusher testified to the verbal employment of petitioner and agreement not to allow any other person to sell it for sixty days (trans. p. 22 et seq.).

Petitioner's major attack upon the disciplinary order arises from the fact the agreement between himself and Mrs. Slusher was not signed by Mrs. Slusher. It is his argument that the absence of a writing upon which he could have enforced the payment of a commission prevents respondent from disciplining him because he was not acting as a broker.

Petitioner appears to overlook the fact that although Civil Code section 1624 states that "the following contracts are invalid, unless the same or some note or memorandum thereof, is in writing and subscribed by the party to be charged . . ." it is the rule that this statute of frauds applies to the remedy only and not to the validity of the contract; that the contract is not void but merely unenforceable (Offeman v. Robertson-Cole Studios, 80 Cal.App.1; Warder *v.* Hutchison, 69 Cal.App. 291; Durbin v. Hillman, 50 Cal.App. 377; O'Brien v. O'Brien, 197 Cal. 577). The same has been held as to a real estate broker's contract. It was held in Coulter v. Howard, 203 Cal. 17, 21: "We agree fully with the language of Muir v. Kane, 55 Wash. 131 (104 P.153) as follows: 'The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract, where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has been barred by the statute of limitations . . . There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries . . .' " The foregoing was again quoted with approval in Estate of Rule, 25 Cal.(2d) 1 and five other California appellate decisions were cited as supporting it.

In other words, the oral agreement between Mrs. Slusher and petitioner was not invalid. It created the relationship

of principal and agent and cast upon petitioner the duties owed by an agent and those owed by a real estate licensee. Petitioner, to subsequently collect a commission, did not have to obtain a contract setting out all the terms of the agreement, but merely "a note or memorandum" (Brewer v. Horst, 127 Cal. 643; Calhoun v. Downs, 211 Cal. 766; Moore v. Borgfeldt, 96 Cal.App. 306). Even a notation for his commission in subsequent escrow instructions would be sufficient to enable him to collect (Coulter v. Howard, supra) or a subsequent writing (Estate of Rule, supra); for the performance of obtaining a buyer would be sufficient consideration for the agreement to pay. Even "$22,000 net. Brokers pay escrow fee" was held sufficient for a reformation to provide for the broker's commission. (Hillman v. Koch, 92 Cal.App.(2d) 163). Hence, the absence of Mrs. Slusher's signature bears on the enforceability of the portion of the agreement providing for the payment of a commission.

Petitioner's argument also overlooks a keystone in the application of the statute of frauds namely, that the subscription required is that "by the party to be charged" (C.C. 1624). The foregoing terms as used in Civil Code sections 1624, 1741 and the analogous language in sections 1971 and 1973 was exhaustively discussed in Harper v. Goldschmidt, 156 Cal. 245, wherein it was held (p. 249): "Before the statute of frauds, an oral agreement could be proved against either party. The statute of frauds in no way interfered or attempted to interfere with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be *proved* unless the essentials of it had been reduced to writing and signed by the party to be charged." As said in Steel v. Duntley, 115 Cal.App. 451: "The party to be charged is the only one who must sign . . . The statute of frauds does not require the signature of any party other than the one to be charged."

In the disciplinary proceeding respondent, petitioner herein, was the only one of the two parties to the oral agreement to be charged therewith and he was the one who set out and subscribed the terms of the oral agreement.

As so often declared, the statute of frauds is designed to prevent fraud, not to shield it, whereas petitioner raises it in an endeavor to escape the consequences of his acts.

Petitioner contends that under the holding in Schomig v. Keiser, 189 Cal. 596, the commissioner cannot discipline him under section 10176 for his dealings with Mrs. Slusher. Whether the rule there announced under Statutes 1919, page 1256, section 12, the forerunner of section 10176, would be followed today, after certain other decisions, is speculative, but petitioner does not come within the rule there declared. In that case it was held that the Real Estate Commissioner could not revoke Schomig's license because the latter had retained $114 which a person had overpaid in monthly instalments on a contract. The brief opinion stated the reason thus: "there is no evidence that Schomig was employed for a compensation to do the acts complained of or that the acts themselves constituted a part of a contract for the sale of real estate. *The evidence shows that they were to be performed by Schomig without compensation, and that in doing so he was not fulfilling a contract for the sale of real estate* but was merely collecting the proceeds of a contract already made." (Emphasis added.)

The evidence herein is directly opposite to the statement of the record just quoted. The letter from petitioner to Mrs. Slusher and her testimony before the hearing officer show conclusively that petitioner was performing his services for the standard five per cent commission. The record herein shows that even though petitioner or his wife was the undisclosed buyer of the realty, a sum equal to the five per cent commission was deducted. The written offer over the signature of his "dummy" which petitioner submitted to Mrs. Slusher expressly provided for a "purchase price

of Thirty three thousand Dollars ($33,000.00)" made up of "$1,000.00 cash deposit herewith, . . . 9,000.00 additional cash into Escrow upon demand . . . 23,000.00 by the execution of a note secured by a First Trust Deed on this property . . . $33,000.00 TOTAL." (exh. A; trans. p. 49).

In the portion on the reverse side thereof captioned "Acceptance", where the seller accepts the offer and which was subscribed by Mrs. Slusher the printed form provided for the payment of a commission and "$1,650.00" had been typed in at two points. This was crossed out and the identical figure added as a subtraction to the acceptance of the offer so that it reads: "The undersigned accepts the offer on the reverse side hereof and agrees to sell the property described thereon on the terms and conditions therein set forth., less $1650.00."

When ", less $1650.00." was typed in does not appear from the record, but the agreement to sell at the price offered "less $1650.00" is an unusual acceptance. In as much as the evidence shows petitioner put up all the money paid, there is no practical difference between the agreement providing for the payment of a commission of $1650.00 out of the selling price and the payment of the selling price "less $1650.00". It would be novel for the law, because of the use of "less" instead of commission, to hold that petitioner was (1) not enriched to that extent and (2) ceased to act as a broker and therefore was not amenable to disciplinary action.

In the petition (par. XIX) seven sub-paragraphs, with one subdivided into five parts, were set out as the claimed grounds for judicial review. The foregoing disposes of those numbered 1, 2, 3, 4a, 4b, part of 4d, and 5.

Items 4a and 4d touch upon the fact that the evidence was that Mrs. Slusher extended the exclusive agency set out in the letter of petitioner without specifying a termination thereof and thereafter listed the property with another

realtor. If some other realtor had sold the property and petitioner had claimed under the open-end extension of the exclusive listing such would have been grounds for discipline under subdivision f of section 10176, but that situation does not prevail. Petitioner's conduct is not excused because his agency may not have been exclusive.

Subdivision 4c is a conclusion of the pleader (cf. Perry v. Chatters, 121 Cal.App.(2d) 813) and fails to specify what findings were not in conformity with what allegations in the accusation (actually the former followed the latter very closely) or what "material issues" were not found upon, although it may be the first portion of 4d is an elaboration of the generality of 4c. Suffice it to say that whether Mrs. Slusher did or did not list the property with another realtor would have no bearing upon whether what petitioner did subjected him to discipline.

There is no merit in subparagraph 6, the generality that the proposed decision of the hearing officer did not contain findings. Attached as exhibit A, to the petition, the proposed decision contains almost six pages of findings among its seven pages.

In subparagraph 7th it is alleged that the decision of respondent was "arbitrary and capricious . . . in that petitioner is informed and believes . . . such Decision was made on the same day . . . with said Proposed Decision, and without the exercise of any independent judgment . . ." There is no requirement which prevents an administrative board or officer from adopting a proposed decision on the same day the latter is made, nor does the fact that the proposed decision is adopted without modification demonstrate the absence of independent judgment. The total absence of evidence under the latter allegation and the presumption that official duty has been performed require a finding against the allegation.

The hearing officer, as noted above, made extensive findings of fact. Each has been examined in the light of the

three volume transcript. The weight of evidence supports each. To separately discuss each would unduly extend this memorandum and serve no purpose because petitioner does not contend that he and the other persons did not do the acts found to have been performed, but rather argues for a different legal effect or result of the acts and these have all been discussed herein.

A writ of mandate will be denied and counsel for respondent will present findings and a judgment in accordance herewith.

June 16, 1959

ELLSWORTH MEYER
Judge

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 717,588

F. J. BUCKLEY, doing business under the fictitious firm name and style of F. J. BUCKLEY & Co., *Petitioner*,

v.

F. W. GRIESINGER, as Real Estate Commissioner of the State of California, *Respondent*.

Judgment

The above entitled matter having come on regularly for hearing on April 18, 1959 in Department 65 of the above entitled court before the Honorable Ellsworth Meyer, Judge presiding, the petitioner being represented by Wolver & Wolver and Marion J. Wright, his attorneys, and the respondent Real Estate Commissioner being represented by his attorney Stanley Mosk, Attorney General of the State of California by Lee B. Stanton and Arthur C. de Goede, Deputy Attorneys General, and the court having carefully

considered the Findings of Fact, Determination of Issues and Decision of the Respondent Commissioner, and having reviewed the complete record, and the court having signed and filed herein its own Findings of Fact and Conclusions of Law, and the court being fully advised in the premises,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petitioner take nothing by his action; that a peremptory writ of mandate be and is denied; and that the respondent have judgment for his costs incurred herein in the sum of $250.

The Clerk is ordered to enter this judgment.

DATED: This 19th day of August, 1959.

ELLSWORTH MEYER
Judge of the Superior Court

APPENDIX E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

Civil No. 24278

Dist. Court of Appeal—Second Dist.

Filed Aug. 22, 1960 J. E. Brown, Clerk

F. J. BUCKLEY, doing business under the fictitious firm name and style of F. J. BUCKLEY & Co., *Plaintiff and Appellant,*

v.

WYNNE A. SAVAGE, as Real Estate Commissioner of the State of California, *Defendant and Respondent.*

APPEAL from a judgment of the Superior Court of Los Angeles County, Honorable Ellsworth Meyer, Judge.

Wolver & Wolver, David H. Cannon, and J. Marion Wright, for Appellant.

Stanley Mosk, Attorney General; Arthur C. DeGoede, Deputy Attorney General, for Respondent.

This is an appeal from a judgment denying the appellant's petition for a writ of mandate.

Appellant was a real estate broker. His license as such was revoked by the respondent, and appellant thereafter filed his petition for a writ of mandate to compel the respondent to desist from any action upon the decision and order revoking the license of appellant as a real estate broker and to revoke the order of revocation and to reinstate the appellant as a real estate broker. From the judgment denying the petition, the appellant has appealed.

In an accusation filed by respondent the appellant was charged with violating the provisions of certain sections of the Business and Professions Code.[1]

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[1] Section 10176, Business and Professions Code provides:

"The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

"(a) Making any substantial misrepresentation.

"(b) Making any false promises of a character likely to influence, persuade or induce.

"(c) . . .

"(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

"(e) . . .

"(f) . . .

"(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or

(1) 10,176(a)—Making substantial misrepresentations; (2) 10,176(d)—Acting for more than one party in a transaction without the knowledge or consent of all parties thereto; (3) 10,176(g)—Taking of a secret or undisclosed amount of compensation, commission or profit; (4) 10,176(i)—Conducting himself in a manner which constitutes fraud or dishonest dealings; (5) 10,177(d)—Willfully disregarding provisions of the Real Estate Law and rules and regulations of the Real Estate Commissioner; (6) 10,177(f)—Conducting himself in a manner which would have warranted the denial of an application for a real estate license; and (7) 10,177(g)—Demonstrating negligence, or incompetence in performing an act for which he is required to hold a license.

The accusation came about from a transaction whereby Buckley used a "dummy", Germaine S. Chambreau, to purchase certain property from Margaret F. Slusher.

A résumé of some of the facts as developed in the administrative hearing is as follows:

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coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

"(h) . . .

"(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

Section 10,177 of the Business and Professions Code provides in part:

"The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following:

"(a) . . .

"(b) . . .

"(c) . . .

"(d) Willfully disregarded or violated any of the provisions of the Real Estate Law or of Chapter 1 of Part 2 or of the Rules and Regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 of Part 2.

"(e) . . .

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license.

"(g) Demonstrated negligence or incompetence in performing any act for which he is required to hold a license.

. . . "

In March, 1955, Buckley observed that the Slusher property, which was located around the corner from his real estate office, was vacant. He contacted Mrs. Slusher and obtained a listing to sell the place. He represented that he had been a realtor on Wilshire Boulevard for many years and that he had many inquiries about the property. He further stated that he had one client who was interested because the property was large and had six bedrooms. Mrs. Slusher stated that she had not thought particularly of selling the property but that she would and that she had been offered $35,000.00 for it some five years ago and that she would sell it for that figure, including a five percent commission. Buckley stated that he could secure $35,000.00 to $37,500.00 for it and that the commission would be five percent. Mrs. Slusher would not give a written exclusive listing but she did give an oral exclusive listing for 60 days while certain painting and renovating work was being done in and on the property. Buckley stated that he would ask $37,500.00 in an attempt to get $35,000.00 and he received a key to the property from Mrs. Slusher at that time.

In a letter on his stationery under date of March 17, 1955 to Mrs. Slusher, Buckley stated in part:

"May I not also thank you for letting us have the exclusive agency on your property at 674 South Crenshaw for $35,000 with $10,000, or more, down payment, and the balance, if any, payable 1% per month including interest at 6%, until paid.

". . . I am confident we will be successful in selling it for you. In order to obtain $35,000, including our commission, I have quoted it at $37,500 because frequently they offer less than the amount of the asking price. If, perchance, we received more than $35,000 you are assured our commission would be only 5% and you would receive the benefit of the excess, if any.

". . .

". . .

"I did want you to know that I have been doing some work on your properties, although I took some time out today, St. Patrick's Day, to meet the Irish Ambassador, and expect to see him again at the California Club tonight."

Buckley told his office employees that he was trying to sell the place and he showed the premises to several prospective buyers. When the painters were about to finish their work at which time about 60 days had elapsed from the date of the exclusive listing, Buckley and Mrs. Slusher met at her home and Buckley stated that he knew he could sell the place but that it had been difficult to show it while the workmen were present and working. Buckley asked for and received an indefinite extension of time in which to sell the property. He continued his efforts to sell the place after the workmen had left. Buckley then went East for two or three weeks in May, 1955 and after his return to California in June he showed the place to some prospective buyers and also began to think of buying the property for himself.

About July 1, 1955 Buckley decided to buy the property for himself and contacted a widow named Germaine S. Chambreau, whom he had known for some years. Mrs. Chambreau signed a letter to Buckley which reads as follows:

"In offering to purchase the property at 674 S. Crenshaw, Los Angeles, or any other property, it is not for my account but for the account of E. Haiss, whom (sic) is advancing all of the money required.

"I have no present or future interest in the property and if I should acquire title I will convey it to any person designated by E. Haiss.

"Of course it is understood that I am to be held free and harmless from all expense and liability in connection with the transaction.

Very truly yours,

/S/ G. S. CHAMBREAU
G. S. CHAMBREAU

"I agree to hold you free and harmless from all expense and liability in connection with the transaction.

S F. J. BUCKLEY
F. J. Buckley"

About August 1, 1955 Mrs. Slusher went to Buckley's office to get the key to her property as she had forgotten to bring her own key. A lady and a salesman at the office of Buckley told her that the Slusher property was not listed with them. The key to the property could not be found at that time. However, later the lady came by the Slusher property and brought the key with her, stating that Buckley had several keys and that Mrs. Slusher might keep the one which was then given to her. Later that same day Mrs. Slusher called Buckley on the telephone and told him the property was not listed at his office, that the house had been broken into and that if the property was not sold within the next week she would have to rent it. Buckley told her that the property would be sold in a week or two and that a man who was out of the city just then was trying to raise money with which to buy the property.

Buckley told Mrs. Chambreau that he had come to the end of the time for the sale of the property and that he should produce an offer with which to get an extension. On August 9, 1955 Mrs. Chambreau signed what she was told was an offer to buy the property. In fact what Mrs. Chambreau signed on August 9 was a "Deposit Receipt" which showed that $1,000.00 had been received from her as a deposit on the purchase price of $33,000.00 for the prop-

erty, the balance to be paid as follows: $9,000.00 in cash in escrow upon demand when title was ready to pass and $23,000.00 by the execution of a note secured by a deed of trust on the property payable at the rate of $200.00 per month. On August 9, the day before an escrow was opened, Buckley told Mrs. Slusher that he had an offer of $33,000.00 cash on her property from a gentlemen whom he did not name and read to her a check in the amount of $1,000.00 payable to F. J. Buckley and Co., as a deposit. Buckley answered Mrs. Slusher's inquiry about why the check was made in favor of Buckley and Co. by saying that such was frequently done. Mrs. Slusher agreed to take $33,000.00 instead of the $35,000.00 or $37,500.00 theretofore spoken of. At Buckley's request the escrow was to be at the Wilshire Escrow Co. rather than with the Title Insurance and Trust Co. which Mrs. Slusher preferred.

On the same day Buckley dictated certain escrow instructions to an escrow officer at the Wilshire Escrow Co. These instructions called for a sales price of $31,350.00, payable $8,350.00 cash and $23,000.00 by a note payable $200.00 per month and secured by a deed of trust on the property. At Buckley's request Mrs. Chambreau signed the escrow instructions without knowing that they were instruments for the purchase of property by her. She had no intention of purchasing anything. She also signed a note and deed of trust in the transaction without any intent to perform any of the obligations and she never gave any money to Buckley nor did she place any money in the escrow for the purchase of the property. Buckley told Mrs. Chambreau that all of the last mentioned documents referred to the offer. She asked to read the instruments but was told by Buckley that she would not understand them and to trust him.

On August 10, 1955 Mrs. Slusher and Buckley met at the escrow office and signed the instruments. Certain changes were then made. The instruments in effect provided that Buckley was to be compensated by the purchaser for serv-

ices rendered and that Buckley was not acting as the agent for the seller. Mrs. Slusher did not receive a copy of the instruments. She read them but did not remember the contents as above set forth and she expressed surprise at the absence of the buyer, Chambreau. Mrs. Chambreau executed amendments to the escrow instruments at the request of Buckley wherein she authorized the escrow company to accept instruments on behalf of G. S. Chambreau from F. J. Buckley.

The deposit receipt and offer which recited on its face that the price of the property was $33,000.00 and the acceptance thereof by Mrs. Slusher of "less $1,650.00" was not deposited in the escrow. The receipt was prepared under the direction of Buckley and the provision therein for a $1,650.00 commission to be paid to Buckley was crossed out. When the "less $1,650.00" was typed in does not appear from the evidence.

Mrs. Slusher executed a deed at the escrow office which did not contain the phrase "a widow" after the name G. S. Chambreau.

After the escrow instructions were signed Buckley had Mrs. Chambreau sign a deed conveying the property to "E. Haiss." Mrs. Chambreau did not know that by such document she was deeding the property nor did she know E. Haiss. E. Haiss was the maiden name of Mrs. Buckley. The escrow closed on September 1, 1955. The Chambreau-Haiss deed was recorded on December 12, 1955 at which time the property was then deeded to a corporation wholly owned by Mr. and Mrs. Buckley.

At no time did Buckley advise Mrs. Slusher that he was no longer acting as her agent. At no time prior to the closing of the escrow did Buckley tell Mrs. Slusher that he was buying the property for himself or for himself and his wife. At no time did he tell Mrs. Slusher who "E. Haiss" was nor did he disclose to her who G. S. Chambreau was.

other than to refer repeatedly to the person as G. S. Chambreau and saying that "he" was a gentlemen in business.

Further and additional facts with reference to the transaction may be found in the report of the decision in the case of *Slusher* v. *Buckley*, 174 Cal. App. 2d 324, 330, decided by this Court.

The Real Estate Commissioner, respondent, revoked the license of appellant, jointly and severally, upon the grounds that he had made substantial misrepresentations by failing to disclose that Mrs. Chambreau was not in fact a bona fide purchaser but was a "dummy" or nominee of Buckley; by failing to disclose that the $1,000.00 deposit was not from Mrs. Chambreau; or that the title was to be taken in his wife's maiden name. Further, that he had acted for more than one party in the transaction without the knowledge and consent of all parties thereto and that he acted by Mrs. Chambreau and Mrs. Buckley, under the name of E. Haiss, without the knowledge and consent of Mrs. Slusher; that the acts of Buckley constituted fraud or dishonest dealing; that he had conducted himself in a manner which would have warranted the denial of a real estate broker's license; that he was not truthful and therefore would have warranted the denial of a license.

In the trial court Buckley asserted that the commissioner was without jurisdiction as he, Buckley, was acting as an individual and not as a real estate broker; that the findings of the commissioner were not supported by the evidence and were not in conformity with the allegations in the accusation, and that the commissioner did not find upon all of the material issues; that as he was not acting as a broker, his conduct was not such as would have warranted the denial of an application for a license; that the decision did not comply with the requirements of Section 11518 of the Government Code and that the commissioner abused his discretion by making his decision on the same day as the proposed decision of the hearing officer was made.

The trial court held against the appellant. Appellant asserts to this Court substantially the same contentions as heretofore mentioned.

It seems clear that under Section 10,176 the misconduct referred to therein must arise in connection with the licensee's "performing or attempting to perform any of the acts within the scope of . . ." Chapter 3 of the Real Estate Act. In other words, the misconduct of the person involved must be connected with his activity as a broker. (*Rattray* v. *Scudder*, 28 Cal. 2d 214, 225-226.) A real estate broker was defined in Sections 10131 and 10134 of the Business and Professions Code.[2]

In this case Buckley offered the property for sale, listed, solicited for prospective buyers and negotiated the sale of the property and he did these things for a compensation, for he negotiated the "less $1,650.00" in the transaction which just happens to equal 5 percent of the sales price. The evidence shows that Buckley put up all of the money which was paid and there is no difference in the end so far as the seller is concerned, from paying a 5 percent commission or in taking 5 percent less for the property. As the

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[2] Section 10131:

"A real estate broker within the meaning of this part is a person who, for a compensation, sells or offers for sale, buys, or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases, rents, or places for rent, or collects rent from real estate, or improvements thereon, for another or others."

Section 10134:

"One act, for a compensation of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating the purchase or sale or exchange of, or listing or soliciting prospective purchasers of real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom constitutes the person making such offer, sale or purchase, exchange or lease, or negotiating the loan, or so renting or placing for rent or collecting the rent or listing or soliciting, a real estate broker or real estate salesman within the meaning of this part."

trial court stated, "It would be novel for the law, because of the use of 'less' instead of commission, to hold that petitioner [Buckley] was (1) not enriched to that extent and (2) ceased to act as a broker and therefore was not amenable to disciplinary action."

Buckley decided to buy the property for himself while still acting as a broker for Mrs. Slusher. To do this he used Mrs. Chambreau, as a nominee, to take title and thereafter had Mrs. Chambreau deed the property to his (Buckley's) wife (using her maiden name) and then had the latter deed it to a corporation wholly owned by Buckley and his wife. Buckley did not disclose to Mrs. Slusher what he was doing under the circumstances and the failure to advise Mrs. Slusher constitutes misconduct because of which it was proper to revoke his license. As stated in *Rattray* v. *Scudder*, supra, 28 Cal. 2d 214, 222-223:

"'The law of California impose[s] on . . . the real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitory consequence that are provided for a disloyal or recreant trustee. (*King* v. *Wise*, 43 Cal. 628.)' (*Langford* v. *Thomas*, 200 Cal. 192, 196 [252 P. 602].) Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. (Citations.)"

A failure to disclose that a real estate agent is purchasing property is grounds for suspension or revocation of the real estate license of the agent. (*Abell* v. *Watson*, 155 Cal. App. 2d 158; *Estrin* v. *Watson*, 150 Cal. App. 2d 107.)

Buckley asserts that he was not acting as a broker because he had no enforceable right to a commission and therefore the real estate commissioner could not discipline him. The trial judge in his memorandum of decision stated:

"Petitioner appears to overlook the fact that although Civil Code section 1624 states that 'the following contracts

are invalid, unless the same or some note or memorandum thereof, is in writing and subscribed by the party to be charged . . . ,' it is the rule that this statute of frauds applies to the remedy only and not to the validity of the contract; that the contract is not void but merely unenforceable (Offeman v. Robertson-Cole Studios, 80 Cal. App. 1; Warder v. Hutchison, 69 Cal. App. 291; Durbin v. Hillman, 50 Cal. App. 377; O'Brien v. O'Brien, 197 Cal. 577). The same has been held as to a real estate broker's contract. It was held in Coulter v. Howard, 203 Cal. 17, 21: 'We agree fully with the language of Muir v. Kane, 55 Wash. 131 (104 P. 153) as follows: "The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract, where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has been barred by the statute of limitations . . . There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries . . ." ' The foregoing was again quoted with approval in Estate of Rule, 25 Cal. (2d) 1 and five other California appellate decisions were cited as supporting it.

"In other words, the oral agreement between Mrs. Slusher and petitioner was not invalid. It created the relationship of principal and agent and cast upon petitioner the duties owed by an agent and those owed by a real estate licensee. Petitioner, to subsequently collect a commission, did not have to obtain a contract setting out all the terms of the agreement, but merely 'a note or memorandum' (Brewer v. Horst, 127 Cal. 643; Calhoun v. Downs, 211 Cal. 766; Moore v. Borgfeldt, 96 Cal. App. 306). Even a notation for his commission in subsequent escrow instructions would be sufficient to enable him to collect (Coulter

v. Howard, supra) or a subsequent writing (Estate of Rule, supra); for the performance of obtaining a buyer would be sufficient consideration for the agreement to pay. Even '$22,000 net. Brokers pay escrow fee' was held sufficient for a reformation to provide for the broker's commission (Hillman v. Koch, 92 Cal. App. (2d) 163). Hence, the absence of Mrs. Slusher's signature bears on the enforceability of the portion of the agreement providing for the payment of a commission.

"Petitioner's argument also overlooks a keystone in the application of the statute of frauds namely, that the subscription required is that 'by the party to be charged' (C. C. 1624). The foregoing term as used in Civil Code sections 1624, 1741 and the analogous language in sections 1971 and 1973 was exhaustively discussed in Harper v. Goldschmidt, 156 Cal. 245, wherein it was held (p. 249): 'Before the statute of frauds, an oral agreement could be proved against either party. The statute of frauds in no way interfered or attempted to interfere with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be *proved* unless the essentials of it had been reduced to writing and signed by the party to be charged.' As said in Steel v. Duntley, 115 Cal. App. 451: 'The party to be charged is the only one who must sign . . . The statute of frauds does not require the signature of any party other than the one to be charged.'

"In the disciplinary proceeding respondent, petitioner herein, was the only one of the two parties to the oral agreement to be charged therewith and he was the one who set out and subscribed the terms of the oral agreement.

"As so often declared, the statute of frauds is designed to prevent fraud, not to shield it, whereas petitioner raises it in an endeavor to escape the consequences of his acts.

"Petitioner contends that under the holdings in Schomig v. Keiser, 189 Cal. 596, the commissioner cannot discipline him under section 10176 for his dealings with Mrs. Slusher. Whether the rule there announced under Statutes 1919, page 1256, section 12, the forerunner of section 10176, would be followed today, after certain other decisions, is speculative, but petitioner does not come within the rule there declared. In that case it was held that the Real Estate Commissioner could not revoke Schomig's license because the latter had retained $114 which a person had overpaid in monthly instalments on a contract. The brief opinion stated the reason thus: 'there is no evidence that Schomig was employed for a compensation to do the acts complained of or that the acts themselves constituted a part of a contract for the sale of real estate. *The evidence shows that they were to be performed by Schomig without compensation, and that in doing so he was not fulfilling a contract for the sale of real estate* but was merely collecting the proceeds of a contract already made.

"The evidence herein is directly opposite to the statement of the record just quoted. The letter from petitioner to Mrs. Slusher and her testimony before the hearing officer show conclusively that petitioner was performing his services for the standard five per cent commission. The record herein shows that even though petitioner or his wife was the undisclosed buyer of the realty, a sum equal to the five per cent commission was deducted. The written offer over the signature of his 'dummy' which petitioner submitted to Mrs. Slusher expressly provided for a 'purchase price of Thirty three thousand Dollars ($33,000.00)' made up of '$1,000.00 cash deposit herewith, . . . 9,000.00 additional cash into Escrow upon demand . . . 23,000.00 by the execution of a note secured by a first Trust Deed on this property . . . $33,000.00 TOTAL.'"

Appellant also asserts in effect that the relationship of Buckley and Mrs. Slusher must be determined solely from

the instruments since there was no ambiguity in the documents and no extrinsic evidence was offered thereon. There is no merit to such a contention. The trial court very properly considered all of the other evidence which clearly establishes Buckley's misconduct.

Appellant also asserts that there was no finding by the trial court that he was acting as a licensee. Administrative proceedings are to be liberally construed. The fact that certain action was taken or a recommendation made raises the presumption that the existence of the necessary facts have been ascertained and found. (*Bailey v. County of Los Angeles*, 46 Cal. 2d 132, 136; *Swars* v. *The Council of the City of Vallejo*, 33 Cal. 2d 867, 872-873; *Rudolph v. Athletic Commission*, 177 A.C.A. 1, 16.) Both the findings of respondent and the findings of the trial court contain findings of the underlying facts which lead unmistakably to the conclusion that Buckley was working for compensation.

The trial court also concluded that the respondent did not abuse his discretion thereby determining that the decision of the respondent was fully supported by the findings and that the findings were supported by the weight of the evidence. (Section 1094.5 Code of Civil Procedure.)

Appellant claims that Mrs. Slusher listed the property with another broker and therefore he must not have been her agent. Mrs. Slusher denied having so listed the property with another broker but even had she so listed the property it would not necessarily benefit Buckley. The mere fact that a person has two or more agents on the sale of a parcel of property does not absolve any one agent of his fiduciary duties.

In any event, it is clear that the commissioner was acting within his jurisdiction under the provisions of Section 10177(f) Business and Professions Code. Buckley was a licensee. All the commissioner had to determine was whether Buckley had conducted himself in a manner which would have warranted the denial of his application for a

license. The respondent found on substantial evidence that Buckley was not truthful or honest which in and of itself is enough to deny an application for a license. As stated in the respondent's trial brief:

". . . From petitioner's conduct, it is also readily seen that petitioner does not understand the obligations between principal and agent, the principles of real estate practice and the canons of business ethics pertaining thereto, another ground for the denial of an application for a license. (See Business & Professions Code, Section 10153(c).) Or does not care to follow such obligations, principles and canons. Petitioner's emphasis on his theory that he was acting as an individual and not as a broker has little bearing on the question of jurisdiction to impose discipline under Section 10177(f). For it is well settled that this section allows disciplinary action against real estate brokers for their conduct in other fields of endeavor.

"See *Karrell* v. *Watson*, 116 Cal. App. 2d 769, 775-776 (conviction of knowingly causing false certificates to be made to secure veteran benefits);

"*Bohn* v. *Watson*, 130 Cal. App. 2d 24, 40."

Appellant also asserts that Mrs. Shu her suffered no detriment and therefore he should not be disciplined. One of the purposes of the Real Estate Act is to insure, as far as possible, that real estate brokers and salesmen will be honest, truthful and of good reputation. (*Riley* v. *Chambers*, 181 Cal. 589, 593. Sections 10150 and 10152 Business and Professions Code.) It was appropriately stated in 11 Opinions Attorney General 108, 110:

"A licensee who utters a substantial falsehood in connection with a real estate transaction is not to be insulated from the consequences of his dishonesty simply because the other party to the transaction suffers no pecuniary loss. Regardless of the lack of pecuniary damage occasioned by the falsehood, the licensee has demonstrated a lack of integrity. . . .

"It is of no significance that conduct justifying disciplinary action against the licensee might not justify an action for damages or rescission on the part of the aggrieved person. . . ." (*Marks* v. *Watson*, 112 Cal. App. 2d 196, 200; see, also, *Slusher* v. *Buckley*, supra, 174 Cal. App. 2d 324, 330.)

The next contention of appellant is that the commissioner acted improperly in adopting the proposed decision as his own on the same day on which the former was rendered. There is nothing before us to indicate that the commissioner did not read the transcript of the proceedings, even if such were required. But, in any event, when the proposed decision is adopted in its entirety or in whole except for a reduction in penalty, the agency need not have read or familiarized itself with the record. (*Hohreiter* v. *Garrison*, 81 Cal. App. 2d 384, 393-399; *Cooper* v. *State Board of Medical Examiners*, 35 Cal. 2d 242, 246; *National Automobile and Casualty Insurance Co.* v. *Industrial Accident Commission*, 34 Cal. 2d 20, 30.)

There is no evidence before this Court to the effect that the commissioner "rubber stamped" the hearing officer's proposed decision. It is also apparent that the trial court exercised an independent judgment upon the whole matter.

Appellant's last contention is that the amendment of the accusation on the first day of the hearing and the refusal to grant a continuance in the manner deprived the appellant of a fair hearing. This contention was not made to the trial court. Issues not raised in the trial court will not ordinarily be considered on appeal. (*Damiani* v. *Albert*, 48 Cal. 2d 15, 18; *Estate of Cunningham*, 148 Cal. App. 2d 8, 13; *King* v. *Tilden Park Estates*, 156 Cal. App. 2d 824, 832.)

The amendment in no way added new facts to the existing ones, rather it simply set forth that by his conduct Buckley violated Section 10176(i) of the Business and Professions Code. No facts were introduced which were not already

alleged in the accusation. Appellant had over two years within which to prepare for the hearing and the denial of the continuance was reasonable and proper.

We entertain no doubt that the respondent's decision and the judgment of the trial court should be upheld. (*Mast* v. *State Board of Optometry*, 139 Cal. App. 2d 78, 91-93; *Genser* v. *State Personnel Board*, 112 Cal. App. 2d 77, 88-89; *Nelson* v. *Dept. Alcoholic Beverage Control*, 166 Cal. App. 2d 783, 788; *Rudolph* v. *Athletic Commission*, supra, 177 A.C.A. 1, 11-12.)

The judgment is affirmed.

FOURT, Acting P. J.

We concur:

LILLIE, J.

SCOTT, (Robert H.), J. pro tempore

APPENDIX F

Filed Oct. 19, 1960

Order Denying Hearing

After Judgment by District Court of Appeal

2nd District, Division 1, Civ. No. 24278

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BUCKLEY

v.

SAVAGE, ETC.

White, J., did not participate herein.

Appellant's petition for hearing DENIED.

GIBSON, C. J.
Chief Justice

APPENDIX G

Constitutional Provisions and Statutes Involved

Amendment XIV of the Constitution of the United States provides in relevant part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . .".

Section 10176, Business and Professions Code provides in relevant part:

> "The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at

any time where the licensee while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

"(a) Making any substantial misrepresentation.

"(b) Making any false promises of a character likely to influence, persuade or induce.

"(c) . . .

"(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

"(e) . . .

"(f) . . .

"(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

"(h) . . .

"(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

Section 10,177 of the Business and Professions Code provides in relevant part:

"The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following:

"(a) . . .

"(b) . . .

"(c) . . .

"(d) Wilfully disregarded or violated any of the provisions of the Real Estate Law or of Chapter 1 of Part 2 or of the Rules and Regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 of Part 2.

"(e) . . .

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license.

"(g) Demonstrated negligence or incompetence in performing any act for which he is required to hold a license.

Section 10100 of the California Business and Professions Code requires that no license be revoked except in conformity with Sections 11500 et seq. of the California Government Code which provide for administrative hearings.